USHEWOKUNZE HOUSING COOPERATIVE SOCIETY LIMITED
and
CREST BREEDERS INTERNATIONAL (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 1 September, 2016

Urgent Chamber application

R Pabwe for applicant
L Uriri for respondent

CHITAKUNYE J: This is an urgent chamber application in which the applicant seeks to interdict respondent from proceeding with infrastructure developments at Saturday Retreat Estate, Harare.

The applicant is a registered housing cooperative in terms of the Co-operative Societies Act [*Chapter 20:05*].

The respondent is the registered owner of four immovable properties all of which are held under deed of transfer 4035/1986. These are:-

1. New Cerney Township 2 of Saturday Retreat Estate measuring 53, 8051 hectares;
2. The Remaining Extent of New Cerney Township of Saturday Retreat measuring 46, 2332 hectares;
3. Lot 2 of Saturday Retreat measuring 22, 0776 hectares; and
4. The Remaining Extent of Saturday Retreat Estate measuring 1 057, 3819 hectares.

From about 2001 to 2003 the Ministry of Lands, Agriculture and Rural Resettlement attempted to compulsorily acquire the properties. As the properties fell in the greater Harare area and not rural area the acquisition encountered some problems. In the meantime applicant and its members took occupation of some of respondent's properties.

The issue of the acquisition was eventually resolved on 13 January 2015 when the Ministry of Lands and Rural Resettlement, as the acquiring authority, and the respondent reached a Deed of Settlement. In that deed of settlement the parties recognised, *inter alia*, that:-

1. The respondent was the original beneficial owner of the property described as the Remaining Extent of Saturday Retreat Estate situate in the District of Salisbury;

2. That a portion of that property is presently occupied by individuals whose interests the Ministry of Lands and Rural Resettlement wished to protect;
3. That there was a dispute between the Ministry of Lands and the respondent in respect of the compulsory acquisition of the said property and the Ministry's legal obligation to pay full and timely compensation to the respondent upon compulsory acquisition of the property which constitutes urban land;

The Ministry and the respondent agreed on settlement terms to be part of an order by consent.

The terms of the settlement were made part of the court order by the Administrative Court. The main clause in that Order state, *inter alia*, that:-

> "1. The compulsory acquisition of the immovable property being the Remaining Extent of Saturday Retreat Estate situate in the District of Salisbury measuring One Thousand and Fifty Seven comma three eight one (1 057,3810) Hectares held under Deed of Transfer 4035/1986(the Property) by the Respondent be and is hereby confirmed.
> 2. The Respondent is entitled to full compensation for the compulsory acquisition of its urban land.
> 3. The manner of compensation shall be as set out in the Memorandum of Agreement entered into between the government of Zimbabwe and the respondent dated 18th December 2014, a copy of which is annexed to this order as Annexure A.
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> 3.1 The Respondent be and is hereby allocated the unoccupied portion of the property measuring 401 hectares.
> 3.2 The respondent is hereby appointed the sole and exclusive developer of the property defined in the Deed of Settlement measuring 401 hectares.
> 3.3 The terms and conditions of such appointment shall be governed by the Agreement entered into between the Government of Zimbabwe represented by the Ministry of Local Government and Urban Development and the respondent a copy of which is annexed to this Order as Annexure A."

As is evident from that order it relates to the Remaining Extent of Saturday Retreat measuring 1 057, 3810 hectares.

In terms of that order respondent was allocated the unoccupied portion of that land measuring 401 hectares. It was also appointed the sole and exclusive developer of that portion.

The respondent was also to receive full compensation for the acquired land in terms of an agreement reached with the Government of Zimbabwe, a copy of which was attached to the order. The effect of that agreement was that respondent was to be paid compensation by occupants of part of the land acquired.

The present applicant has since made an application to the Supreme Court for a review of the order by consent granted by the Administrative Court.

In the meantime respondent has set upon developing the property by opening up roads and other necessary infrastructure requirements.

It was upon such conduct that applicant approached this court seeking to stop the respondent's action pending the determination of its application for review at the Supreme Court.

The order applicant seeks is couched as follows:-

> "FINAL ORDER SOUGHT
> That you show cause to this Honourable Court why a final order should not be made in the following terms:-
> 1. That the Respondent and any person acting through it be and is hereby barred from interfering with the Applicant's occupation of the housing stands allocated to its members in **Saturday Retreat Estate,** Harare and carrying out any developments on the said land pending finalisation of the matter pending before the Supreme Court under case No. SC 548/15.
> 2. Costs of suit.
>
> INTERIM RELIEF GRANTED
> 1. That the Respondent or its employees be and are hereby ordered to vacate the portion of land allocated to Applicant in **Saturday Retreat Estate**, Harare upon service of this order.
> 2. That the Respondent be and is hereby ordered to remove any and all its equipment from the portion of land allocated to Applicant in **Saturday Retreat Estate**, Harare upon service of this order.
> 3. That in the event of refusal by Respondent to comply with this order, the Deputy Sheriff be and is hereby authorised to effect this order."

The respondent opposed the application. A number of *points in limine* were raised in the opposing papers.

On the date of hearing respondent raised further *points in limine* on points of law. This ruling is thus in respect of the *points in limine* so raised.

Counsel for respondent submitted that:-

1. The present proceedings are frivolous or vexatious. This court has inherent jurisdiction to dismiss an application that is frivolous or vexatious. (*Ebrahim Wholesalers* v *Crown Clothing* 1966 (3) SA 689 at 690E and *Zikiti* v *United Bottlers* 1998(1) ZLR 389@393F – 390E.)

2. That the interdict cannot be sought for the purpose of perpetuating an illegality. In this case counsel argued that applicant has not complied with a High Court Order in case No. HC 4416/2003 which declared their occupation of the property in question unlawful.

3. That the matter is not urgent as the applicant has been aware of the Administrative Court order for a very long time and had not approached court for a stay.

4. That the application has not been made in good faith.

The applicant's counsel contended that the *points in limine* be dismissed. Firstly she argued that the raising of *points in limine* that are not in the opposing papers should not be

allowed. In this regard she referred to *Muchakata* v *Netherburn Mine* 1996(1) ZLR 153(S) and Gold *driven Investments* (Pvt) *Ltd* v *Tel-One (Pvt) Ltd and Another* 2013(1) ZLR 172. The two cases involved the raising of a point of law on appeal.

The general principle that emerges from the authorities is that a point of law can be raised at any time or stage of the proceedings, provided its consideration does cause unfairness to the other party.

The question that would need to be addressed is one of prejudice/ unfairness. In *casu,* these points are not being raised on appeal. I did not hear applicant's counsel to allude to any particular prejudice or unfairness to be occasioned by their consideration serve probably for being caught unawares. That is an aspect that can be cured by seeking a postponement or even a brief adjournment to prepare. The nature of the *points in limine* raised was such that it went to the root of the matter and, in my view, it involved a matter applicant's legal practitioners should have applied their minds to when deciding what course of action to take upon receiving instructions. I am thus of the view that this is a case the *points in limine* raised on the date of hearing should be considered.

The applicant's application is premised on its application for review before the Supreme Court. The applicant argued that that application has prospects of success and so respondent's action should be stayed till the determination of the Supreme Court application.

The application before the Supreme Court is titled 'Court application for Review in terms of Rule 26 of the Supreme Court Rules, 1964.' Upon perusal of the said rules I noted they are not properly cited. If the applicant meant Rules of the Supreme Court, 1964, then a further problem arises which is that s 26 of those Rules is under Part IV which deals with Criminal Appeals from the High Court. The application before the Supreme Court is not one such. It is not concerned with an appeal from the High Court but an order of the Administrative Court. I did not hear applicant's Counsel to address this anomaly.

The application before the Supreme Court was further said to be in terms of s 26 of the Supreme Court Rules as read with s 25 of the Supreme Court Act, [*Chapter 7:13*].

It is on this aspect that the frivolity of the application was seriously contested. The question counsel had to contend with was the validity or otherwise of a direct application for review before the Supreme Court in view of the provisions of s 25 of the Supreme Court Act. The respondent's counsel argued that in terms of that section a party cannot apply directly to the Supreme Court for review at first instance.

That section provides that:-

"25 **Review powers**

(1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.
(2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or an application before the Supreme Court.
(3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination."

It is clear to me that whilst s 25(1) provides that the Supreme Court or a judge thereof can exercise the same review powers as the High Court or judge thereof, subsections (2) and (3) set out limitations to and instances when such review powers maybe exercised. The reviews powers are to be exercised *mero motu* by the Supreme Court or judge thereof and not at the application of a litigant.

In *Chairman, Zimbabwe Electoral Commission & Another* v *Bennet &Another* 2005 (2) ZLR 296(S) court held that:-

> "The Supreme Court is an appellant court. It has no original jurisdiction except when it sits as a Constitutional Court by virtue of s24 of the constitution. Although s 25 of the Supreme Court Act [chapter 7:13] gives the court or judge of the court the same review powers as the High Court, the effect of subsections (2) and (3) is that, although the Supreme Court may correct an irregularity in proceedings or in the making of a decision which comes to its attention (which may not necessarily be by way of appeal or application**) no person has the right to institute any review in the first instance before the court**." (emphasis is mine)

In *Nherera* v *Kudya NO & Another* 2007 (2) ZLR 253 (S) @ 256B-E the Honourable CHIDYAUSIKU CJ had this to say on the meaning of s 25:-

"A proper reading of the above section reveals that the section provides the following-

(a) It confers review jurisdiction on the Supreme Court and every judge of the Supreme Court;
(b) The review jurisdiction conferred on the Supreme Court and every judge of the Supreme Court is of the same level as the High Court or a judge of the High Court and is over inferior courts, tribunals and administrative authorities;
(c) The review jurisdiction is exercisable by the Supreme Court and/or every judge of the Supreme Court *mero motu* when an irregularity comes to its/his/her attention;
(d) In terms of s 25 of the Act, no person has a right to institute review proceedings in the first instance in the Supreme Court; and
(e) The section provides for the making of rules for review by the High Court and also for the Supreme Court or any judge of the Supreme Court to remit a matter for review to the High Court."

In *Kwaramba* v *Bhunu NO* 2012 (2)ZLR 358(S) CHIDYAUSIKU CJ reiterated the same position pertaining to reviews in terms of s 25 of the Act.

It is crystal clear from the section, and the interpretation thereof as noted in the above cases, that a litigant has no right to make a direct application to the Supreme Court or to a judge of the Supreme Court seeking review of a decision by an inferior court. By making a direct application for review to the Supreme Court the applicant is seeking what the Supreme Court has on a number of occasions said you cannot do.

There is thus merit in the argument that the applicant is not serious in applying for review and in this application as well. It ought to know that its application is doomed to fail as the Supreme Court has pronounced its position already. The applicant's counsel did not allude to any changes in the law that may be in applicant's favour. The applicant's case is thus without merit.

The respondent is justified in contending that the application is frivolous or vexations. In *Rogers* v *Rogers & Another* 2008 (1) ZLR 330(S) @ 337 MALABA JA (as he then was) quoted with approval the words of BOSHOFF J in *S* v *Coopers & Others* 1977 (3) SA 475(T) at 476D wherein the learned judge said that:-

> "The word 'frivolous' in its ordinary and natural meaning connotes an action characterised by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in legal sense 'frivolous or vexatious' when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation."

I am of the view that the application before me is exactly that in as far as it is premised on the assertion that the application for review has prospects of success.

The relief being sought has its own challenges. The interim relief seeks to have respondent and its employees ordered to vacate the land occupied by applicant in Saturday Retreat Estate and to remove its equipment from the said land. The final relief also seeks to have the respondent and any person acting through it to be barred from interfering with the Applicant's occupation of the housing stands allocated to its members in Saturday Retreat Estate, Harare pending the finalisation of the application for review before the Supreme Court in case No. SC 548/15.

The challenge is that the order whose review applicant sought pertains to the Remaining Extent of Saturday Retreat, a property measuring 1 057, 3810 hectares, and not Saturday Retreat Estate as stated in the draft order. The respondent pointed out the anomalies in the description of the land acquired by the State in terms of the order by consent and the

properties not acquired but which applicant is occupying in defiance of a court order in HC 4416/2003.

Despite the anomalies having been pointed out the applicant maintained its stance. Clearly, therefore, the relief being sought relates to a different property from the one subject of the Administrative Court Order.

This attitude shows that the application may not have been made in good faith but to harass and cause annoyance to respondent. Had applicant been serious and acting in good faith it would surely have noted the anomalies at inception. If not, it would have sought to attend to them once they were pointed out.

I am of the view that just from the above discourse the application cannot succeed. This court has inherent powers to regulate its own proceedings and avoid abuse of court process. This is one such case where court should not allow the matter to proceed beyond this stage.

In the circumstances the application fails.

The respondent's counsel also contended that granting the interdict will be perpetuating an illegality as the applicant is in open defiance of this court's declaratory order that the applicant's occupation of the other properties not acquired is unlawful.

The applicant's response was to the effect that the properties it is occupying were acquired by the State. It sought to rely on a letter from the Ministry of Justice dated 18 December 2015 as further confirmation of the acquisition. Unfortunately for the applicant, that letter refers to the Remaining Extent of Saturday Retreat Estate and not to Saturday Retreat Estate or other properties as described by the respondent. The two properties applicant was declared to be in unlawful occupation of were described in the order in HC 4416/2003 as:

1. New Cerney Township 2 of Saturday Retreat Estate and
2. Remainder of New Cerney Township of Saturday Retreat Estate.

As already alluded to, these two properties are not subject of the Administrative Court Order by Consent yet they remain unlawfully occupied by the applicant in spite of this court's order in HC4416/2003.

The application would still have failed on this point as well.

Costs

The respondent asked for costs on a higher scale. This court has discretion as to whether to grant such costs or not. It is appreciated that costs on a higher scale are not

granted just at the asking but must be justified. The discretion must be exercised judiciously taking into account the circumstances of the case. In the circumstances of this case I am disinclined to award costs on the higher scale. Costs will be on the ordinary scale.

Accordingly the application is hereby dismissed with costs on the ordinary scale.

Mutebere & Company, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners